U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: March 9, 1988
CASE NOS. 85-CPA-47
85-CPA-57

IN THE MATTER OF

SEATTLE-KING COUNTY PRIVATE INDUSTRY COUNCIL,

COMPLAINANT,

v.

U.S. DEPARTMENT OF LABOR,

RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

FINAL DECISION AND ORDER

This case arises under the provisions of the Comprehensive Employment and Training Act (CETA), 29 U.S.C. §§ 801-999 (Supp. V 1981), and the Job Training Partnership Act (JTPA), 29 U.S.C. §§ 1501-1781. 1/ Administrative Law Judge (ALJ) Steven E. Halpern issued a decision on June 11, 1987, holding that the Seattle-King County Private Industry Council (PIC) was entitled to $3,666.62 as reimbursement for legal fees it incurred after July 31, 1984, in proceedings concerning the closeout of certain CETA grants. 2/ The Grant Officer excepted to the decision on June 30, 1987, and

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1/ CETA was repealed by JTPA on October 13, 1982, but CETA administrative and judicial proceedings pending on that date or begun before September 30, 1984, were not affected. 29 U.S.C. § 1591(e). CETA and JTPA are administered through implementing regulations found at 20 C.F.R. Parts 675-689 and 20 C.F.R. Parts 626-636 (1987), respectively.

2/ In the Matter of Seattle-King County Private Industry Council v. U.S. Department of Labor, Case Nos. 85-CPA-47, 85-CPA-57, Decision and Order (D. and O.) at 5.

on July 17, 1987, the Secretary issued an order asserting jurisdiction and establishing a briefing schedule. 3/

BACKGROUND

The CETA program utilized a number of political entities as prime sponsors to obtain grant funds to operate programs under the Act. A Prime Sponsor could be a State, a unit of general local government or a consortium of units of general local government. 4/ In the Seattle, Washington, metropolitan area, a consortium of units of general local governments was organized to obtain funds through a series of grants from the U.S. Department of Labor to operate a variety of employment and training programs under the auspices of CETA. Apparently, during the decade of the CETA program's existence, the consortium had a number of names, but during CETA's final fiscal year (FY), 1983, the prime sponsor was the Seattle-King County Employment and Training Consortium 5/ or simply, the Employment and Training Consortium (ETC). 6/ On October 13, 1982, JTPA was enacted as the successor of CETA. The new law provided that CETA program activities were to cease as of September 30, 1983, 29 U.S.C. § 1591(a), and that funds received by prime sponsors under JTPA or CETA, could be expended to provide for an orderly

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3/ In the Matter of Seattle-King County Private Industry Council v. U.S. Department of Labor, Case Nos. 85-CPA-47, 85-CPA-57, Secretary's Order Asserting Jurisdiction and Notice of Briefing Schedule.

4/ 20 C.F.R. § 676.2(a),(b),(c).

5/ Transcript (T.) at 5.

6/ Supplemental Materials Requested by Administrative Law Judge Letter of January 7, 1987, dated January 30, 1987, submitted by counsel for PIC.

transition of programs under CETA to JTPA. 29 U.S.C. § 1591(c)(4). 7/ Although the record does not provide the specific dates, as the CETA program wound down, ETC was disbanded and the PIC was established to obtain funds and operate programs under JTPA. T. at 4-5.

After the enactment of JTPA, the Department's Region X Office published a series of CETA Bulletins which were sent to prime sponsors in the region, including the PIC, to provide instructions and policy guidance for the phase down and closeout of existing CETA programs. 8/ These instructions provided for an Administrative Cost Pool (ACP) to be established to fund the activities associated with the audit and closeout of the various CETA program activities, and permitted the transfer of excess program subpart funds to the ACP. 9/ (Usually administrative costs were strictly limited to a maximum percentage of the total grant funds and excess program funds would not be available to meet administrative costs.) The Bulletins consistently warned the prime sponsors that a cutoff date had been established with

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7/ The pertinent language entitled "TRANSITION" at Section 181(c)(4) of JTPA provides:

> (c) Notwithstanding the provisions of subsection (a), Governors, prime sponsors, and other recipients of financial assistance under this Act, may expend funds received under this Act, or under the Comprehensive Employment and Training Act, prior to October 1, 1983, in order to--
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> * * * *
>
> (4) conduct any other activity deemed necessary by the recipient to provide for an orderly transition to the operation, as of October 1, 1983, of programs under this Act.

8/ Pre-Trial Statement of Grant Officer, dated October 31, 1986. Attachments, tabbed 2-12, at 10-51.

9/ Id. Attachments at 12.

regard to closeout costs that would be allowable as charges against the ACP. On January 4, 1984, and on subsequent dates, the CETA Bulletins indicated that the cutoff date for incurring closeout costs was March 31, 1984, or six months after the termination of CETA program activities. 10/ Four of the regional CETA Bulletins expressly stated that costs incurred after March 31, 1984, would have to be paid from local funds, and not from ACP funds. 11/ A letter from Grant Officer Michael D. Brauser, dated March 29, 1984, notified all CETA prime sponsors in Region X, including the PIC, that the closeout date for ACP charges was "extended from 3/31/84 to 4/30/84." The letter also stated that certain prime sponsors who met specific audit conditions, with permission, could have the cutoff date extended until July 31, 1984. The letter specifically warned, "[i]n no case, will this extension go beyond July 31, 1984." 12/ On May 1, 1984, the Grant Officer again communicated by letter to all Region X prime sponsors, withdrawing his previous statement that he might allow some administrative costs after the termination of the ACP. This withdrawal was in deference to specific Departmental policy statements concerning CETA post-closeout costs. 13/

On June 26, 1984, the Grant Officer communicated directly to Al Starr, Director of the Seattle-King County PIC, notifying him that the PIC's ACP deadline was extended to July 31, 1984. The letter to Mr. Starr specified that any audit work or resolution efforts concerning two specific subgrantee audits then under appeal to the Grant Officer that might be undertaken after

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10/ Id. Attachments at 15, 21, 26, 35, 41, 44, Attachment 9 (unnumbered).

11/ Id. at 26, 35, 41 and 44.

12/ Id. at 46-48,

13/ Id. at 49.

July 31, 1984, would have to be funded through non-CETA sources. 14/ Counsel for the PIC stipulated that the PIC and the Consortium received notice of the proposed cutoff of charges to the ACP from the Regional Office in substantially the manner described above. 15/

On May 13, 1985, the PIC submitted a letter to the Grant Officer claiming costs incurred in resolving outstanding CETA audit or investigation issues. One of the claims was $3,666.22 16/ for legal fees and other costs incurred in the resolution of CETA audit issues. The supporting documentation revealed that the costs were for services rendered from August 21, 1984, through January 14, 1985. 17/ On May 24, 1985, the Grant Officer advised the PIC that the legal fees incurred by the PIC were "not allowed as the work occurred subsequent to the termination of the extended ACP on 7-31-84." 18/

On June 12, 1985, the PIC requested a hearing before the Office of Administrative Law Judges (OALJ) pursuant to 20 C.F.R. § 629.57, under JTPA. 19/ On June 25, 1985, counsel for the PIC sent a complaint to the Grant Officer in accordance with 20 C.F.R. § 676.86, under CETA. On July 1, 1985, the Grant Officer denied the "request for the filing of a complaint", and

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14/ Id. at 51.

15/ Stipulation, ¶ 6, Joint Exhibit 1, dated December 15, 1986.

16/ This amount is at variance with the ALJ's decision which awards $3,666.62. The variance is de minimus.

17/ Pre-Trial Statement of Grant Officer at 54-65.

18/ Request for ALJ Hearing, by Armstrong & Alsdorf, P.C., Attorneys for Seattle-King County Private Industry Council, dated June 12, 1985, appending copy of May 24, 1985, letter from Grant Officer.

19/ Id.

informed counsel of the opportunity to request an administrative hearing before the OALJ. 20/ 0nJuly8, 1985, the PIC requested a hearing pursuant to 20 C.F.R. § 676.88, under CETA. The cases were assigned case numbers 85-CPA-57 and 85-CPA-47, respectively. The cases were consolidated at the hearing and are treated as a single case here.

A hearing was held on December 15, 1986, and the ALJ issued his decision on June 11, 1987. See supra p. 1. The ALJ determined that he had jurisdiction over this case under 20 C.F.R. § 676.88, since this was a matter arising under CETA, while Section 181 of JTPA governed the transition from CETA to JTPA (D. and 0. at l-2). Although the PIC was not the CETA prime sponsor, nor the recipient of CETA funds from which the ACP was established, the ALJ found that the Department's dealings with the PIC were in the same manner as it dealt with CETA prime sponsors and afforded the PIC the rights of a de facto CETA prime sponsor, and therefore entitled to CETA prime sponsor rights under Section 181(c)(4) of JTPA. D. and 0. at 4. He then found that the Department's establishment of a cutoff date for administrative charges against the ACP to be arbitrary and contrary to the intent and purpose of Section 181(c)(4) of JTPA to accomplish the orderly transition from CETA to JTPA. D. and 0. at 4-5.

DISCUSSION

The Grant Officer's exceptions challenged the ALJ's determination that the PIC could assert a claim for CETA costs when it had no legal relationship with the Department under that statute, and in fact found that

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20/ Request for Administrative Hearing, by Armstrong & Alsdorf, P.C. Attorneys for Seattle-King County Private Industry Council, dated July 8, 1985, appending copy of June 25, 1985, letter from PIC counsel and copy of July 1, 1985, letter from the Grant Officer.

the PIC was a separate entity and not the legal successor to the CETA Consortium. The Grant Officer also contended that the costs for legal services were in connection with the litigation of CETA cases and represented the prosecution of a claim against the government, and that they did not pertain to the administration of a grant program and, therefore, were not allowable. The Grant Officer also excepted to the ALJ's finding that the establishment of the cutoff date was arbitrary and contrary to Section 181(c)(4) of JTPA.

On December 15, 1986, the date of the hearing, the parties entered into a stipulation, admitted as Joint Exhibit 1, that framed the issues in this case. They are:

> (a) Where DOL gave notice of the proposed cutoff, yet work was performed at the request of and to the benefit of DOL and the former prime sponsor, are the challenged legal costs allowable or unallowable?
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> (b) Was actual notice sufficient to validate DOL's proposed cutoff, or was it necessary for DOL to follow additional steps in order to effectuate any such cutoff of the administrative cost pool?

Although the parties' filings before me discuss a wide-ranging series of issues, many of which were not addressed below, I believe that this case may be more simply resolved. The dispositive issue is whether the procedure used by the Department in establishing a termination date for CETA closeout charges against the administrative cost pool (ACP) is binding on Seattle-King PIC. There is no dispute that the Department notified the organizations concerned with the phasedown and closeout of the CETA program, including PIC, of its establishment of a termination date for allowable administrative costs. The Department also warned these organizations that any closeout costs incurred after the termination date would have to be

borne by local funds, and not CETA funds. The issue has two aspects. First, was the Department bound, as PIC contends, to follow the notice, comment and publication requirements for rulemaking under the Administrative Procedure Act (APA), 5 U.S.C. § 553(b) (1982)? Second, if it was not, did the Department act within the scope of its authority pursuant to the transition provisions of Section 181 of JTPA, 29 U.S.C. § 15911

As noted, the ALJ found that the July 31, 1984, cutoff date for expenditure of ACP funds was arbitrary, and was inconsistent with and in derogation of the intent and purpose of section 181(c)(4) of JTPA. D. and 0. at 4-5. I do not agree with that conclusion. When section 181(c)(4) is read together with the legislative history of the transition provisions of JTPA, it seems reasonably clear that Congress intended all closeout activities to be completed and expenditures for such purposes to have been made by September 30, 1983.

Section 181(c) provides in pertinent part that:

> [R]ecipients of financial assistance under [JTPA], or under [CETA], may expend funds received under [JTPA], or under [CETA], prior *to* October 1, 1983, in order to --
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> * * * *
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> (4) conduct any other activity deemed necessary by the recipient for an orderly transition to the operation, as of October 1, 1983, of programs under [JTPA].

29 U.S.C. § 1591.

The ALJ and the PIC apparently interpret this language to mean that any funds <u>received</u> by a recipient prior to October 1, 1983, may be expended for any transition activity. That reading, however, would make the transition period entirely open ended; as long as the funds were received prior to October 1, 1983, they could be expended on transition activities at any time without limitation.

A more reasonable interpretation of section 181(c)(4) is that the date October 1, 1983, applies to the phrase "may expend funds", and establishes that as the cutoff date for all transition activities and expenditures. This conclusion is reinforced by the legislative history. The section on "Transition Provisions" in Senate Report No. 97-469, 97th Cong., 2nd Sess. 29 (1982), reprinted in 1982 U.S. Code Cong. & Ad. News 2664, says

> While all of these program buildup activities are occurring during the transition period [October 13, 1982, the date of enactment of JTPA, to September 30, 1983], CETA will be phasing down and undergoing program closeouts .... Audits, closeouts and debt collection of former program operations must be completed. The transition provisions of the bill will allow for all of these activities to be concluded in an orderly fashion while preparing for the full implementation of [JTPA].

(Emphasis added.)

PIC asserts that the cutoff date established by the Department of Labor was a rule required by section 181(f)(S) and section 169(a) of JTPA to be published for notice and comment in accordance with the Administrative Procedure Act (APA), 5 U.S.C. § 553 (1982). I agree that the various communications establishing and extending the cutoff date in this case constituted a "rule" under 5 U.S.C. § 551(4) because it was "an agency statement of general . . . applicability and future effect ... describing the ... procedure, or practice requirements of.an agency ...." Eowever, neither sections 169(a) and 181(f)(5) of JTPA, 29 U.S.C. §§ 1579, i591, nor the rule making provisions of the APA, 5 U.S.C. § 553(b), requires this rule to be published for notice and comment. Section 169(a) simply grants power to the Secretary to promulgate rules and regulations to carry out JTPA "in accordance with [the APA]". Section 181(f) requires publication for notice and comment for three types of rules under JTPA, but

the cutoff date does not fall into any of those categories.

The requirement in the APA that a rule be published for notice and comment does not apply to "rules of agency, organization, procedure, or practice ...." 5 U.S.C. § 553(b)(A). The courts have recognized that there is no bright line separating substantive rules from rules of agency practice and procedure, but rather, most rules fall along a continuum from primarily substantive to procedural. "An internal agency 'practice or procedure' is primarily directed toward improving the efficient and effective operations of an agency, not toward a determination of the rights of [sic] interests of affected parties." Batterton v. Marshall, 648 F.2d 694, 702, n.34 (D.C. Cir. 1980). As the court said in Lamoille Valley R. co. v. I.C.C., 711 F.2d 295 (D.C. Cir. 1983), "[t]he issue is one of degree - whether the substantive effect is sufficiently grave so that notice and comment are needed to safeguard the policies underlying the APA." 711 F.2d at 328.

In Lamoille Valley R. Co. v. I.C.C., the I.C.C. adopted a compressed time schedule for considering applications for mergers involving bankrupt northeastern railroads. The shortened time schedule, which was adopted to comply with a 180 day time limit imposed by Congress in the Northeast Rail Service Act of 1981, 45 U.S.C. § 1112(a)(1982), departed substantially from the I.C.C.'s published regulations establishing procedures for submitting and responding to applications for approval of railroad mergers. The shortened time schedule, which was not published for notice and comment, was challenged by a railroad opposed to the merger of two competitors.

The court held that the compressed time schedule was definitely at the

procedural end of the continuum from substance to procedure. The court said:

> When a rule prescribes a timetable for asserting substantive rights, we think the proper question is whether the time allotted is so short as to foreclose effective opportunity to make one's case on the merits. This standard allows an agency ample discretion to structure its proceedings as it sees fit.

711 F.2d at 328.

Similarly, in Kessler v. F.C.C., 326 F.2d 673 (D.C. Cir. 1963) the court held the F.C.C. was not required to publish for notice and comment a "freeze order" on accepting new applications for radio and television station licenses. See also Ranger v. F.C.C., 294 F.2d 240 (D.C. Cir. 1961) (a rule establishing a cutoff date for broadcast license applications was procedural and did not have to be published for notice and comment.)

I find that the cutoff date established by the Department of Labor here was a procedural rule which did not have to be published for notice and comment. It is similar to the "freeze order" and cutoff date in Kessler v. F.C.C. and Ranger v. F.C.C., which had the effect of foreclosing pursuit of private rights. Particularly in light of the apparent Congressional intent that CETA closeout activities be concluded by September 30, 1983, 21/ the cutoff date was primarily directed toward the efficient and effective operations of the Department of Labor in winding up the CETA program.

21/ PIC apparently does not challenge (as it could not without undermining the rest of its case) the Secretary's authority to extend the closeout date from September 30, 1983, to July 31, 1984.

Without setting a cutoff date, the Department of Labor could never finally close out CETA.

Although the cutoff date was not published in the Federal Register, there seems to be no dispute that PIC had actual notice of each established date and each extension. The requirement to publish all rules does not apply where "persons subject thereto ... have actual notice thereof . . . ." 5 U.S.C. § 553(b); Kessler v. F.C.C., 326 F.2d at 690.

CONCLUSION

Therefore, the decision of the ALJ is REVERSED and the Grant Officer's determination disallowing reimbursement for costs incurred by the Seattle-King County Private Industry Council after the termination of the ACP cutoff date is AFFIRMED.

SO ORDERED;

Ann McLaughlin

Secretary of Labor

Washington, D.C.

CERTIFICATE OF SERVICE

Case Name: In the Matter of Seattle-Kine County Private Industry Council v. U.S. Department of Labor

Case Nos. 85-CPA-47
as-CPA-57

Document: Final Decision and Order

A copy of this document was sent to the following parties on March 9, 1988.

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